

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

BRENT EVERETT RUSS,

Defendant.

NO: 2:15-CR-0139-TOR

**ORDER TRANSFERRING
DEFENDANT'S MOTION UNDER 28
U.S.C. § 2255 TO VACATE, SET
ASIDE, OR CORRECT SENTENCE**

BEFORE THE COURT is Defendant's second Motion Under 28 U.S.C.

§ 2255 to Vacate, Set Aside, or Correct Sentence (ECF No. 109). Defendant

14 | previously filed a motion under 28 U.S.C. § 2255 in November 2016. ECF No. 93.

15 | That motion was denied on February 9, 2017. ECF No. 103. The Court has

16 | reviewed the present motion, the record, and files herein, and is fully informed.

17 | For the reasons discussed below Defendant's motion (ECF No. 109) will be

¹⁸ transferred to the Ninth Circuit Court of Appeals.

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DISCUSSION

The district court lacks authority to review successive habeas motions filed without authorization from the court of appeals. 28 U.S.C. § 2255(h); 28 U.S.C. § 2244(b)(4)(A); see also *United States v. Allen*, 157 F.3d 661, 664 (9th Cir. 1998). The Antiterrorism and Effective Death Penalty Act of 1996 [AEDPA] amended the federal habeas statutes and added the requirement that any prisoner seeking to file a successive habeas application must first file, in the appropriate court of appeals, a motion for an order authorizing the district court to consider the successive application. 28 U.S.C. § 2244(b)(3)(A); Ninth Circuit Rule 22-3(a). Once the applicant files such a motion, the court of appeals then reviews the successive application to determine whether it contains (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by Supreme Court, that was previously unavailable. 28 U.S.C. § 2255(h).

17 As previously noted, the Court has already denied Mr. Russ's first motion
18 under 28 U.S.C. § 2255. ECF No. 103. Neither the record nor any evidence
19 submitted by Mr. Russ shows that he obtained the required authorization from the

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1 Ninth Circuit. Therefore, this Court does not have jurisdiction to consider his
2 application for relief. Ninth Circuit Rule 22-3(a) provides in part,

3 If an unauthorized second or successive . . . section 2255 motion is
4 submitted to the district court, the district court may, in the interests of
justice, refer it to the Court of Appeals.

5 The Court believes it is in the interest of justice to transfer this case to the
6 Ninth Circuit. See also 28 U.S.C. § 1631. In general, the Ninth Circuit has taken a
7 broad view of when transfer is appropriate, recognizing that “[n]ormally transfer
8 will be in the interest of justice because normally dismissal of an action that could
9 be brought elsewhere is ‘time-consuming and justice-defeating.’” *Amity*
10 *Rubberized Pen Co. v. Mkt. Quest Grp. Inc.*, 793 F.3d 991, 996 (9th Cir. 2015)
11 (citation omitted). Transferring Mr. Russ’s Motion would expedite a just result in
12 his case.

13 Accordingly, **IT IS HEREBY ORDERED:**

- 14 1. Mr. Russ’s Motion to Vacate, Set Aside or Correct Sentence Pursuant to
15 28 U.S.C. § 2255, filed June 29, 2017, ECF No. 109, shall be terminated
16 in this Court and **TRANSFERRED** to the Ninth Circuit Court of
17 Appeals for determination of whether his Motion should be authorized
18 pursuant to 28 U.S.C. § 2255(h).
- 19 2. Mr. Russ is advised that this transfer will not itself constitute compliance
20 with 28 U.S.C. § 2255 and Circuit Rule 22-3(a). Mr. Russ must still file

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1 an application for leave to proceed with the Ninth Circuit and make the
2 showing required by § 2255. The Clerk of the Court shall send Mr. Russ
3 a copy of the Ninth Circuit **Form 12**.

4 3. The corresponding civil file, 2:17-CV-0241-TOR, shall be **CLOSED**.

5 The District Court Executive is directed to enter this Order and provide
6 copies to the parties.

7 **DATED** July 7, 2017.



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9 A handwritten signature in blue ink that reads "Thomas O. Rice".
THOMAS O. RICE
10 Chief United States District Judge
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